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Nos. 13-354 and 13-356

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Supreme Court of the United States

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

(Additional Caption on the Reverse)

On Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and Third Circuit

BRIEF FOR AMICI CURIAE CHURCH-STATE SCHOLARS FREDERICK MARK GEDICKS, CAITLIN BORGMANN, CAROLINE MALA CORBIN, STEVEN K. GREEN, B. JESSIE HILL, RICHARD SCHRAGGER, MICAH SCHWARTZMAN, ELIZABETH SEPPER, NELSON TEBBE, *ET AL.*, IN SUPPORT OF THE GOVERNMENT

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January 28, 2014

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,

Petitioners,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. Granting Hobby Lobby a RFRA Exemption Would Violate the Establishment Clause by Shifting the Costs of Accommodating Its Religious Beliefs to Its Employees and Their Dependents 7

A. The Establishment Clause Prohibits Religious Exemptions That Impose Significant Burdens on Third Parties 9

B. The Free Exercise Clause and Title VII Also Preclude Religious Exemptions That Impose Significant Burdens on Third Parties 13

1. Free Exercise Clause 13

2. Title VII 16

C. Cost-Shifting Accommodations Are Permitted Only When Necessary to Protect a Religious Organization's Nonprofit Activities 17

D. The Exemption Hobby Lobby Seeks Would Impose a Significant Burden on Identifiable and Discrete Third Parties 20

1. Unconstitutional burden-shifting 20

2. The costs imposed on employees 22

II. RFRA Should Be Interpreted to Avoid Violating the Establishment Clause 27

A. Observing Establishment Clause Limits Is a Compelling Government Interest 27

B. Other Exemptions from the Mandate Do Not Diminish the Compelling Governmental Interest Because They Do Not Shift the Costs of a Religious Accommodation to Third Parties 29

CONCLUSION 34

TABLE OF AUTHORITIES

PAGES

CASES

Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) 28

Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) 16

Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) 13

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 10

Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013) ..... *passim*

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Cutter v. Wilkinson, 544 U.S. 709 (2005) ..... *passim*

EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307 (4th Cir. 2008) 16

Employment Division v. Smith, 494 U.S. 872 (1990) 8

Estate of Thornton v. Caldor, Inc.,
472 U.S. 703 (1985) ..... *passim*

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 10, 11

Gentala v. City of Tucson,
213 F.3d 1055 (9th Cir. 2000) 28

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 20, 22

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723 F.3d 1114 (10th Cir. 2013) ..... *passim*

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Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952) 18, 19

Lee v. Weisman, 505 U.S. 577 (1992) 4, 10, 27

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Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) 7, 29

Otten v. Balt. & O.R. Co., 205 F.2d 58 (2d Cir. 1953) 12

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Sherbert v. Verner, 374 U.S. 398 (1963) 15, 16

Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 10, 21

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 14

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 5, 8, 16, 17

United States v. Lee, 455 U.S. 252 (1982) ..... *passim*

United States v. Seeger, 380 U.S. 163 (1965) 21

Virts v. Consol. Freightways Corp. of Del., 285 F.3d 508 (6th Cir. 2002) 16, 17

Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970) 21

Welsh v. United States, 398 U.S. 333 (1970) 21

Widmar v. Vincent, 454 U.S. 263 (1981) 28

Wisconsin v. Yoder, 406 U.S. 205 (1972) 15

FEDERAL STATUTES

42 U.S.C. § 300gg-13(a)(4) 22, 30

42 U.S.C. § 702 ..... 17, 18

Religious Freedom Restoration Act of 1993,
42 U.S.C. § 2000bb *et seq.* ..... *passim*

42 U.S.C. § 2000bb-1(a) 4

42 U.S.C. § 2000bb-1(b) 4, 7, 27

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42 U.S.C. § 2000bb(a)(5) 27

42 U.S.C. § 2000bb(b)(1) 8, 15

I.R.C.. § 3127(a) 14

I.R.C. § 4980H(c)(2)(A) 29, 30

I.R.C. § 5000A(d)(2)(B) 30

I.R.C. § 6033(a)(3)(A)(i) 30

I.R.C. § 6033(a)(3)(A)(iii) 30

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 ..... *passim*

FEDERAL REGULATIONS

29 C.F.R. § 2590.715-2713A(a) 30

29 C.F.R. § 2590.715-2713A(b)(2) 30

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45 C.F.R. § 147.131(a) 30

45 C.F.R. § 147.131(b) 31

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are law professors who teach and write about church-state issues.[1] They submit this brief to offer a more thorough analysis of the Establishment Clause implications of the religious accommodation at issue in this case than was undertaken in the decisions below.

Amici include: **Frederick Mark Gedicks**, Guy Anderson Chair & Professor of Law, Brigham Young University Law School; **Vincent Blasi**, Corliss Lamont Professor of Civil Liberties, Columbia Law School; **Caitlin Borgmann**, Professor of Law, CUNY School of Law; **Caroline Mala Corbin**, Professor of Law, University of Miami School of Law; **Sarah Barringer Gordon**, Arlin M. Adams Professor of Constitutional Law and Professor of History, University of Pennsylvania Law School; **Steven K. Green**, Fred H. Paulus Professor of Law, Director of the Center for Religion, Law & Democracy, Willamette University College of Law; **Leslie C. Griffin**, William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las

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[1] Letters from the government and the *Conestoga Wood* petitioners consenting generally to the filing of briefs by amici curiae are on file with the Court. The *Hobby Lobby* respondents consented to the filing of this brief by letter to counsel dated January 17, 2014. Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than Amici, their members, and their counsel made any monetary contribution to the preparation or submission of the brief.

Vegas; **B. Jessie Hill**, Associate Dean for Faculty Development and Research, Professor of Law and Laura B. Chisolm Distinguished Research Scholar, Case Western Reserve University School of Law; **Andrew M. Koppelman**, John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University; **Martha C. Nussbaum**, Ernst Freund Distinguished Service Professor of Law and Ethics, Law School and Department of Philosophy, The University of Chicago; **Eduardo Peñalver**, John P. Wilson Professor of Law, The University of Chicago; **Michael J. Perry**, Robert W. Woodruff Professor of Law, Emory University School of Law; **Frank S. Ravitch**, Professor of Law & Walter H. Stowers Chair of Law and Religion, Michigan State University College of Law; **Zoë Robinson**, Associate Professor of Law, DePaul University College of Law; **Lawrence Sager**, Alice Jane Drysdale Sheffield Regents Chair, University of Texas at Austin School of Law; **Richard Schragger**, Perre Bowen Professor of Law, Barron F. Black Research Professor of Law, University of Virginia School of Law; **Micah Schwartzman**, Edward F. Howrey Professor of Law, University of Virginia School of Law; **Elizabeth Sepper**, Associate Professor of Law, Washington University School of Law; **Steven H. Shiffrin**, Charles Frank Reavis, Sr., Professor of Law Emeritus, Cornell University Law School; **Nelson Tebbe**, Professor of Law, Brooklyn Law School; and **Laura Underkuffler**, Associate Dean for Academic Affairs and J. DuPratt White Professor of Law, Cornell University Law School.

The institutional affiliations of Amici are supplied for the purpose of identification only and the positions set forth below are solely those of Amici.

SUMMARY OF ARGUMENT

The Establishment Clause prohibits the government from shifting the costs of accommodating a religion from those who practice it to those who do not. As this Court has held, "The First Amendment . . . gives no one the right to insist that in pursuit of their own interest others must conform their conduct to his own religious necessities." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (citation omitted).

The *Hobby Lobby* respondents and the *Conestoga Wood* petitioners (collectively "Hobby Lobby") ask this Court to construe the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), to allow them a religious exemption from covering certain forms of contraception under the contraception mandate (the "Mandate") of the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, *amended by* Pub. L. No. 111-152, 124 Stat. 1029 ("ACA"). The Mandate would otherwise require Hobby Lobby to cover contraception at no additional cost to its employees. Granting the exemption would shift the cost of accommodating Hobby Lobby's religious exercise to employees who do not share its beliefs. Such cost-shifting violates the Establishment Clause.

Throughout this and other litigation involving the Mandate, the lower courts have failed to examine the Establishment Clause implications of the RFRA exemption sought here. The prohibition against cost-shifting religious accommodations does not affect the facial validity of RFRA because most accommodations do not impose significant costs on others. But the Establishment Clause prohibits

RFRA's application where – as here – a particular exemption would shift the costs of the accommodated religious practice to identifiable and discrete third parties in the for-profit workplace. This prohibition controls the outcome of this case regardless of how this Court might rule on the *prima facie* elements of Hobby Lobby's RFRA claim. Thus, if a RFRA exemption from the Mandate violates the Establishment Clause, such an exemption cannot be granted regardless of whether this Court ultimately finds that Hobby Lobby is a "person" exercising religion and that the Mandate substantially burdens Hobby Lobby's religious beliefs. *See* 42 U.S.C. § 2000bb-1(a), (b). "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

The Establishment Clause prohibition on cost-shifting religious accommodations was recently reaffirmed and applied in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). *Cutter* addresses the facial constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a federal statute that closely tracks its antecedent, RFRA. *Id.* at 714–15. While upholding the "institutionalized persons" provision of the statute, the Court held that in "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries . . . ." *Id.* at 720. Statutes creating permissive accommodations of religion – like RFRA and RLUIPA – are thus subject to the Establishment Clause prohibition on such accommodations when they burden third parties.

Cutter's rejection of cost-shifting under RLUIPA rests on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703. In *Caldor*, this Court held that a statute requiring employers to accommodate their employees' Sabbath observance violated the Establishment Clause because of the "substantial economic burdens" it imposed on employers and the "significant burdens" it imposed on other employees. *Id.* at 710. The unanimous opinion in *Cutter* cited and quoted *Caldor* with approval in holding that RLUIPA accommodations that burden third parties violate the Establishment Clause. *See* 544 U.S. at 720 (citing *Caldor*, 472 U.S. at 703); *id.* at 722 (quoting *Caldor*, 472 U.S. at 709–10).

The Court has similarly rejected religious accommodations that impose costs on a class of discrete and identifiable third parties when interpreting the Free Exercise Clause and Title VII of the Civil Rights Act of 1964. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982) (refusing to grant employer an exemption from payroll taxes under Free Exercise Clause because of, *inter alia*, the burden the exemption would have imposed on its employees); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (interpreting Title VII to require employer accommodation of employee religious practices only when costs to employers and other employees are *de minimis*). Indeed, this Court has upheld a cost-shifting permissive accommodation of religion in only a single decision, allowing the nonprofit arm of a church to require its employees to adhere to its religious standards. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

The Mandate requires that Hobby Lobby provide insurance coverage of contraceptive drugs and services to employees and their dependents free of all co-payments, co-insurance, and other out-of-pocket payments beyond the employees' contribution to their health plan premiums. This coverage is a legally mandated and economically valuable employee entitlement, just like benefits provided by the Social Security Act, the Fair Labor Standards Act, the Family and Medical Leave Act, and other federal statutes that mandate specific employee compensation and benefits. If this Court were to uphold Hobby Lobby's claim for a RFRA exemption from the Mandate, it would deprive Hobby Lobby's thousands of female employees and the covered female dependents of all employees of this entitlement. This, in turn, would saddle them with significant burdens ranging from the substantial out-of-pocket expense of purchasing certain contraceptives to the personal and financial costs of unintended pregnancies. The Establishment Clause does not permit this.

Moreover, these burdens would not be imposed only on Hobby Lobby employees, or only with respect to the contraceptives to which it religiously objects. If Hobby Lobby were granted the RFRA exemption it seeks, there would be no principled way to distinguish accommodation of its objections to a few forms of contraception from accommodations sought by an employer who religiously opposes all forms of contraception. *See, e.g.*, *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (granting for-profit corporation and its owners a preliminary injunction under RFRA, applicable to all FDA-approved contraceptive methods). Every for-profit employer

and business owner in the United States will be empowered to reject insurance coverage for contraception or any other medical prescription, procedure, treatment, or health service it finds religiously objectionable.

The Establishment Clause requires that RFRA be interpreted not to authorize the sort of cost-shifting religious accommodation that Hobby Lobby seeks. Thus, even if Hobby Lobby may assert a corporate RFRA claim, and even if it can establish that the Mandate substantially burdens its religious exercise, it cannot prevail because the Constitution prevents the application of RFRA sought here. Indeed, RFRA itself provides that the statutory right gives way to a "compelling state interest," 42 U.S.C. § 2000bb-1(b), and conformity with the Constitution is always such an interest. Accordingly, and as more fully set forth below, RFRA may not be applied in a manner that causes the government to violate the Establishment Clause by allowing a for-profit employer to claim a religious accommodation that imposes a significant burden upon thousands of discrete and identifiable third parties who will derive no benefit from the accommodation.

ARGUMENT

I. GRANTING HOBBY LOBBY A RFRA EXEMPTION WOULD VIOLATE THE ESTABLISHMENT CLAUSE BY SHIFTING THE COSTS OF ACCOMMODATING ITS RELIGIOUS BELIEFS TO ITS EMPLOYEES AND THEIR DEPENDENTS.

Under the Establishment Clause, no significant burden associated with a permissive religious accommodation like RFRA may be displaced onto a

discrete and identifiable group of third parties that does not benefit from the accommodation. *See Cutter*, 544 U.S. at 720; *Caldor*, 472 U.S. at 710; *see also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. (forthcoming Apr. 2014), *available at* http://ssrn.com/abstract=2328516. This Court's accommodation jurisprudence under the Free Exercise Clause and Title VII also recognizes the constitutional prohibition on cost-shifting. *E.g.*, *United States v. Lee*, 455 U.S. at 261; *Hardison*, 432 U.S. at 84.

RFRA is a permissive accommodation. Its stated purpose is to provide *more* protection for religious exercise than the Free Exercise Clause requires after *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4), (b)(1). RFRA exemptions, therefore, must satisfy Establishment Clause limitations on the permissive accommodation of religion.

The Tenth Circuit ignored these long-established constitutional and statutory doctrines when it summarily dismissed concerns that a RFRA exemption would impose the costs of Hobby Lobby's religious beliefs on employees who do not share them. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1144–45 (10th Cir. 2013) ("Accommodations of religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere").[2]

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[2] Because the Third Circuit determined that a "person" under RFRA did not encompass the

But cost-shifting permissive accommodations are not "frequent" at all. This Court has allowed only one, in a circumstance involving the nonprofit religious operations of a church and its member-employees. *See Amos*, 483 U.S. 327. Nothing in that case supports a grant of the RFRA exemption Hobby Lobby seeks.

A. The Establishment Clause Prohibits Religious Exemptions That Impose Significant Burdens on Third Parties.

This Court has consistently found an Establishment Clause violation when the government accommodates religion in the for-profit workplace or other secular environment by imposing significant burdens on a discrete class of identifiable persons who do not benefit from the accommodation.

Government accommodations of religion can be either "mandatory" or "permissive." Accommodation is mandatory when a law targets a religion with special burdens not imposed on comparable secular or other religious conduct, such that the Free Exercise Clause requires an accommodation. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993).

Accommodation is permissive when Congress or the state legislatures enact accommodations not mandated by the Free Exercise Clause, but which otherwise comply with the constitutional limits

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Conestoga Wood Specialties petitioners, the panel did not reach the constitutional implications of the exemption sought. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013).

prescribed by the Establishment Clause. *See, e.g., Lee v. Weisman*, 505 U.S. at 587; *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18–19 (1989) (plurality opinion).

The Establishment Clause has long been understood to prohibit government from requiring one person to support the religion of another. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). Prominent members of the Founding generation condemned laws that compelled people to give financial support to or to observe the tenets of a government-established religion to which they did not belong.[3] *See Cutter*, 544 U.S. at 729 (Thomas, J.,

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[3] *See, e.g.*, Thomas Jefferson, *The Virginia Act for Establishing Religious Freedom*, enacted by the Gen. Assem. of Va., Jan. 19, 1786 ("[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief."), *quoted in Everson v. Bd. of Educ.*, 330 U.S. 1, 28 (1947) (Rutledge, J., dissenting); Thomas Jefferson, *Draft of Bill Exempting Dissenters from Contributing to the Support of the Church* (Nov. 30, 1776) ("[A]ll Dissenters of whatever Denomination from the said Church [of England] shall . . . be totally free and exempt from all Levies Taxes and Impositions whatever towards supporting and maintaining the said Church as it now is or may hereafter be established and its Ministers."), *in* 5 The Founders' Constitution 74, 74 (Philip B. Kurland & Ralph Lerner eds., 1987); James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 4

concurring) ("[E]stablishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers.").

These historical concerns are reflected in contemporary Establishment Clause decisions. In *Estate of Thornton v. Caldor, Inc.*, the Court struck down a Connecticut statute that granted every employee an absolute right to be free from work on his or her Sabbath regardless of the burden this imposed on the employer and other employees. 472 U.S. at 710–11. By giving employees an unqualified right not to work on their Sabbath, the statute shifted the costs of accommodating Sabbath observance to employers and nonobservant employees, forcing employers to offer premium pay to attract volunteers to cover weekend shifts, or to order non-Sabbath observers to cover such shifts irrespective of their seniority or personal preferences. *Id.* at 709–10. This, the Court held, violated the Establishment Clause:

> This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . : The First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.

(asserting that proposed Virginia religious tax "violate[d] equality by subjecting some to peculiar burdens" and "granting to others peculiar exemptions"), *quoted in Everson*, 330 U.S. at 66 (Rutledge, J., dissenting).

Id. at 710 (quoting *Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)) (internal quotation marks, internal block quoting, and ellipses deleted).

The Court unanimously affirmed the holding and rationale of *Caldor* in *Cutter*, 544 U.S. 709. *Cutter* rejected a facial challenge to RLUIPA, a permissive accommodation statute identical to RFRA in all material respects. *Id.* at 714–15. It did so, however, on the express understanding that the statute would violate the Establishment Clause if it threatened the safety or other interests of third parties:

> Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, as-applied challenges would be in order.

Id. at 726.

Explaining that its "decisions indicated that an accommodation must be measured so that it does not override other significant interests," *id.* at 722, the Court quoted *Caldor* with approval:

> In *Caldor*, the Court struck down a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." We held the law invalid under the Establishment Clause because it "unyielding[ly] weigh[ted]" the interests of Sabbatarians "over all other interests."

Id. (quoting *Caldor*, 472 U.S. at 709, 710).

Thus, the Court relied on *Caldor* as authority for its holding that RLUIPA exemptions may not impose significant burdens on third parties: "Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720 (citing *Caldor*, 472 U.S. 703 (1985)); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring in the judgment) ("[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or so discriminate against other religions as to become an establishment.").

B. The Free Exercise Clause and Title VII Also Preclude Religious Exemptions That Impose Significant Burdens on Third Parties.

1. *Free Exercise Clause*

The Court's mandatory accommodation decisions under the Free Exercise Clause reflect the same aversion to cost-shifting exemptions as its Establishment Clause decisions. In *United States v. Lee*, 455 U.S. at 254–55, 260–61, the Court refused a free-exercise exemption to an Amish employer who objected to the payment of Social Security taxes on his employees. Concluding that the federal government has a compelling interest in the uniform collection of such taxes, the Court observed:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which

> are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.

Id. at 261.[4]

Similarly, in *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Court construed the Fair Labor Standards Act to require a nonprofit religious organization to pay the minimum wage to employees working in its *for-profit* commercial operations because of the burdens a free-exercise exemption would have imposed on third parties. 471 U.S. 290, 302 (1985) (an exception to FLSA coverage for the religious nonprofit "would be likely to exert downward pressure on wages in competing businesses" and thereby compromise the right of workers in such businesses to earn the minimum wage).

Indeed, the very decisions that RFRA sought to restore, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963), were careful to note that the free-exercise exemptions they granted did not impose significant costs on third parties. *See* 42 U.S.C. § 2000bb(b)(1) ("The purposes

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[4] Congress understood *Lee* to have rejected a cost-shifting accommodation under the Free Exercise Clause. It later tailored a permissive accommodation to this holding by exempting religiously objecting employers (like the petitioner in *Lee*) from payment of employee Social Security taxes, but *only* with respect to employees who shared the same objection and would therefore also reject receipt of Social Security benefits. *See* I.R.C. § 3127(a).

of this chapter are . . . to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened.").

In *Yoder*, two parents who were members of the Old Order Amish religion were convicted of violating a Wisconsin law making school attendance compulsory for children younger than sixteen. 406 U.S. at 207–08. The parents argued that the compulsory-attendance law violated the Free Exercise Clause as applied to them because their religion forbade attendance in high school. *Id.* at 208. The Court found in favor of the parents, but only after concluding that the case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.* at 230.

Similarly, in *Sherbert*, the petitioner was discharged for refusing to work on Saturday, the Sabbath Day of her faith, and South Carolina then disqualified her from receiving unemployment benefits because of her failure to accept suitable work when offered. 374 U.S. at 399, 401. The Court held that this disqualification burdened petitioner's free exercise rights, especially because South Carolina law expressly protected the employment rights of Sunday worshippers in other contexts. *See id.* at 404–06. Finding no compelling state interest in the policy, the Court held that the practice violated the Free Exercise Clause. *Id.* at 409. In arriving at its holding, the Court specifically noted that "the recognition of the appellant's right to unemployment benefits under the state statute [does

not] serve to abridge any other person's religious liberties." *Id.*; *see also id.* at 410 ("This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society.").

2. *Title VII*

Finally, this Court has authoritatively interpreted Title VII to permit accommodations of employee religion only when the costs borne by employers are de minimis. *Hardison*, 432 U.S. at 84. Any other standard, the Court held, would impose an "undue hardship" on the employer, contrary to Title VII, by forcing the employer to impose on other employees the costs of accommodating a religion in which they did not believe or participate. *Id.* ("[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.").

The *Hardison* de minimis test for Title VII accommodations was reaffirmed by the Court in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67, 69 (1986), and is widely followed in the federal courts of appeals, *see, e.g.*, *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312–14 (4th Cir. 2008); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1322–23 (11th Cir. 2007); *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 517 (6th Cir. 2002); *see also* 3 Lex K. Larson, Employment Discrimination § 56.06[1] (2d ed. 2013) (explaining application of *Hardison* to subsequent Sabbath cases under Title VII).

C. Cost-Shifting Accommodations Are Permitted Only When Necessary to Protect a Religious Organization's Nonprofit Activities.

The Court has recognized only one narrow exception to the rule that religious accommodations may not impose significant costs on third parties: when accommodation is necessary to protect a church's ability to advance its religious purposes through its nonprofit activities.

In *Amos*, the Mormon Church fired the building engineer of a nonprofit gymnasium it operated, for failing to observe the highest standards of Mormon belief and practice. 483 U.S. at 330 & nn.3–4. The Church acted under section 702 of Title VII, which exempts "all activities of religious organizations" from the statute's general prohibition on religious discrimination in employment. *Id.* at 332 n.9. The Court rejected an Establishment Clause challenge to section 702 despite the obvious burden it imposes on third parties. *Id.* at 337 n.15, 340.

The Court observed that a religious organization would be put at risk if section 702 exempted only "religious activities" (as it did originally), thereby forcing a church to predict which of its activities a secular court might consider "religious" and thus exempt from Title VII. *Id.* at 336 & n.14 (noting the Church's argument that "the District Court failed to appreciate that the Gymnasium . . . is expressive of the Church's religious values").

Accordingly, the Court held that section 702 permissibly alleviated "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. This holding was expressly

limited, however, to a religious organization's *nonprofit* activities. Addressing the District Court's fear that wealthy churches might "extend their influence and propagate their faith by entering the commercial, profit-making world," the Court emphasized that the Church's operation of the Gymnasium was both a religious and a nonprofit activity that had endured for more than 75 years. *Id.* at 337 (quoting dedicatory prayer).

Amos thus stands for the proposition that the government may choose to relieve a nonprofit run by a church of the risk of liability when it insists that employees adhere to its religious mission. *Id.* at 336–37. In this sense, *Amos* follows other decisions that shield churches from government regulation or oversight so that they may retain control in defining and pursuing their religious ends. *E.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (reaffirming "ministerial exception" that requires dismissal of lawsuits by those designated as ministers against their churches for adverse employment actions); *Serbian Eastern Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976) (holding that church had final authority to decide whether and by what means to remove bishop); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952) (invalidating state law that would have superseded church authority to determine what ecclesiastical body controlled use of cathedral).

This line of authority has no application to a commercial enterprise operating for profit. Unlike churches and their nonprofit arms, for-profit

corporations enjoy no right to exercise their religion – if indeed they can claim such a right at all – at the expense of others who do not share their beliefs. In the commercial sphere, when the government provides a religious exemption that burdens third parties, it effectively compels them to bear the costs of practicing someone else's religion in violation of the Establishment Clause. Like the salespeople in the retail store in *Caldor*, 472 U.S. at 705, or the farmhands and carpenters employed by Mr. Lee, *U.S. v. Lee*, 455 U.S. at 254, the employees of the Hobby Lobby stores may not be required to underwrite their employer's religion.

Caldor and *Cutter* prohibit religious accommodations that impose a significant burden on identifiable third parties who derive no benefit from the accommodation.[5] But this principle does not apply to exemptions that allow churches and their nonprofit arms to follow their religious beliefs by selecting as employees those who share and abide by those beliefs. The considerations that may permit special accommodations for churches and religious

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[5] The *Amos* majority sought to distinguish *Caldor* by observing that it was the Church, not the government, that forced the employee to choose between his religion and his job. *Amos*, 483 U.S. at 337 n.15. This is not persuasive; religious employers may threaten employees with their jobs *only when empowered to do so* by a permissive accommodation like section 702. *See id.* at 347 (O'Connor, J., concurring). *Cutter* effectively abandoned this approach when it relied on *Caldor* to foreclose cost-shifting RLUIPA exemptions rather than employing *Amos* to uphold them. *Cutter*, 544 U.S. at 720.

nonprofits have no bearing, therefore, on the availability of a RFRA exemption to for-profit businesses like Hobby Lobby.

D. The Exemption Hobby Lobby Seeks Would Impose a Significant Burden on Identifiable and Discrete Third Parties.

1. *Unconstitutional burden-shifting*

Many permissive religious accommodations entail no burden on third parties. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435–37 (2006), for example, a 130-member sect that used a controlled substance in its sacraments was excused from compliance with federal drug laws. The Court noted that the government did not identify any burdens imposed on persons not belonging to the sect, *see id.* at 435–36, and that the sect's small size prevented the government from showing that a RFRA exemption would compromise its administrative or drug enforcement interests, *see id.* at 437.

Other permissive religious accommodations create third-party burdens that are insignificant because they are widely distributed among a large and indeterminate class. The prototypical example is a property tax exemption for churches, along with all other nonprofit entities, which the Court has held does not violate the Establishment Clause by requiring taxpayers to make an unwilling "contribution to religious bodies." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 667 (1970). There, the incremental increase in the pre-existing tax

burden was spread among all owners of taxable property and did not fall on a discrete class.[6]

The cases excusing religious objectors from compulsory military service pursuant to federal law provide another example of burden-shifting that crosses no constitutional line. The exemption for religious pacifists upheld in *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163 (1965), resulted in a mathematical increase in the probability that nonexempt persons would be drafted in their place. This increase in probability, however, was both infinitesimal and distributed among millions of nonexempt potential draftees. Like the incremental tax increase in *Walz*, the religious pacifist exemption barely increased an already existing burden, and thus did not impose significant *additional* costs on others in violation of the Establishment Clause, even though whoever was drafted in place of the objectors faced the consequence of going to war.

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[6] Where a tax exemption ran only to religious publications, in contrast, a plurality of the Court evinced intolerance for the burden imposed on other taxpayers, even though it was widely dispersed. *Bullock*, 489 U.S. at 14 (plurality opinion) (recognizing that "[e]very tax exemption . . . affects non-qualifying taxpayers, forcing them to become indirect and vicarious donors," but finding no Establishment Clause problem so long as "that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end" (internal quotation marks and citations omitted)).

By contrast, affording Hobby Lobby an exemption to the Mandate would, for the reasons set forth below, impose significant burdens on an identifiable group of persons. Unlike the exemption from the drug laws in *O Centro*, an exemption from the Mandate would significantly impact the thousands of female employees and female dependents of Hobby Lobby employees who do not share the same religious beliefs as their for-profit employer, by requiring them to pay for or forgo contraceptives that Hobby Lobby's health plan would otherwise cover. Moreover, whereas the tax and draft exemption cases involved an infinitesimal, marginal increase in an already-existing burden, the religious accommodation sought by Hobby Lobby would impose significant costs on employees that would not exist but for the exemption from the Mandate that Hobby Lobby seeks.

2. *The costs imposed on employees*

The Mandate is a valuable legal entitlement for Hobby Lobby's employees. It requires that employer health plans cover FDA-approved contraception and related services without "patient cost-sharing" – that is, without co-payments, co-insurance, deductibles, or other out-of-pocket expense beyond the employee's share of the basic health-insurance premium. 42 U.S.C. § 300gg-13(a)(4).

Although Hobby Lobby is seeking an exemption for only four contraceptives, *Hobby Lobby*, 723 F.3d at 1125, there is no principled way to distinguish its RFRA claim from that of an employer who religiously objects to all forms of contraception covered by the Mandate or, indeed, to any covered medical benefit. If Hobby Lobby prevails, every for-profit employer

and business owner in the United States will have a basis for rejecting insurance coverage for contraception and any other medical prescription, procedure, service, or device to which the employer religiously objects.

Congress enacted the Mandate in part in response to studies showing that that "[i]ndividuals are more likely to use preventive services if they do not have to satisfy cost-sharing requirements" and that "[u]se of preventive services results in a healthier population and reduces health care costs by helping individuals avoid preventable conditions and receive treatment earlier." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013). In particular, Congress recognized that "women have unique health care needs . . . [that] include contraceptive services" and sought to "ensure that recommended preventive services for women would be covered adequately . . . ." *Id.*; *see also* Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 16–18 (2011) ("IOM Rep.") (noting that women's health needs differ from those of men, and these differences have a serious impact on the cost of healthcare coverage).

Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men, largely because of the costs of reproductive and gender-specific conditions, including the costs of contraception. IOM Rep. at 19–20; *see also* Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, Guttmacher Rep. on Pub. Pol'y, Aug. 1998, at 5. Oral contraception costs women an average of $2,630 over

a five-year period. James Trussell et al., *Erratum to "Cost Effectiveness of Contraceptives in the United States,"* 80 Contraception 229, 229 (2009). IUDs (to which Hobby Lobby objects) can cost nearly one thousand dollars in addition to the costs of placement and follow-up visits.[7] Some contraceptive methods are not medically suitable for women with particular medical conditions or risk factors, and certain methods are more effective at preventing pregnancy than others. *See* 78 Fed. Reg. at 39,872; IOM Rep. at 105.

Women take account of costs when deciding whether to use contraceptives. *See* Melissa S. Kearney & Phillip B. Levine, *Subsidized Contraception, Fertility, and Sexual Behavior*, 91 Rev. of Econ. & Stat. 137 (2009) (decreasing the cost of contraceptives leads to a higher usage rate which, in turn, decreases the rate of unintended pregnancies). If Hobby Lobby is granted an exemption, thousands of women will incur significant out-of-pocket costs or have to forgo these particular FDA-recommended preventive services if they cannot afford to pay for them.[8] For women who need a

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[7] *See, e.g., If Mirena Isn't Covered*, Mirena, http://www.mirena-us.com/how-to-get-mirena/if-mirena-isnt-covered.php (last visited Jan. 24, 2014) (noting product cost of $927.18); *Cost Comparison Chart*, ParaGard, http://www.paragard.com/ how-do-i-get-it/Payment.aspx (last visited Jan. 24, 2014) (product cost of $754).

[8] A 2007 study found that 52 percent of women (compared with only 39 percent of men) failed to fill a prescription, missed a recommended test or treatment, or did not schedule a necessary specialist

particular contraception option at a particular time, this loss of coverage is a discrete, focused, and significant harm – especially in emergencies entailing the risk of pregnancy from coerced sex.

In addition, there are numerous health-related repercussions and collateral economic costs associated with the failure to make available a full range of contraception. For example, pregnancy may be dangerous for women with serious medical conditions, such as pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome. IOM Rep. at 103–104; *see also* 78 Fed. Reg. at 39,872. Likewise, "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy[,]" which include the prevention of certain cancers, menstrual disorders, and acne. 78 Fed. Reg. at 39,872; IOM Rep. at 107.

The use of contraceptives also reduces the risk of unintended pregnancies, which comprise nearly half of all pregnancies in the United States. IOM Rep. at 102–03. "Because women experiencing an unintended pregnancy may not immediately be aware that they are pregnant[,] their entry into prenatal care may be delayed, they may not be motivated to discontinue behaviors that present risks for the developing fetus[,] and they may experience depression, anxiety, or other conditions." *Id.* at 103. The result is that women with unintended pregnancies are less likely to receive

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appointment because of cost. Sheila D. Rustgi et al., *Women at Risk: Why Many Women Are Forgoing Needed Health Care,* The Commonwealth Fund, May 2009, at 3.

timely prenatal care, and are more likely to smoke, consume alcohol, become depressed, and experience domestic violence during pregnancy. *Id.* This, in turn, increases deleterious health outcomes for infants, including low birth weight and prematurity. *Id.*; *see also* 78 Fed. Reg. at 39,872.

Unintended pregnancies also prevent women from participating in labor and employment markets on an equal basis with men. *See* Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of U.S. Women Seeking Care at Specialized Family Planning Clinics*, 87 Contraception 465, 465 (2012) ("Economic analyses have found clear associations between the availability and diffusion of oral contraceptives particularly among young women, and increases in U.S. women's education, labor force participation, and average earnings, coupled with a narrowing in the wage gap between women and men.").

The Tenth Circuit's exemption of Hobby Lobby from the Mandate under RFRA thus constitutes the exercise of congressional power (in the enactment of RFRA) and federal judicial power (in ordering an exemption under RFRA's authority) to force Hobby Lobby employees to pay money for benefits that they otherwise would receive without additional expense, for the sole purpose of enabling Hobby Lobby's practice of its religion. This is precisely the kind of cost-shifting to accommodate religion prohibited by the Establishment Clause.

II. RFRA SHOULD BE INTERPRETED TO AVOID VIOLATING THE ESTABLISHMENT CLAUSE.

The Establishment Clause marks a structural constitutional limit that government cannot exceed. *See, e.g., Lee v. Weisman*, 505 U.S. at 589–90, 596. It is axiomatic that federal legislation like RFRA may not be applied in a manner that conflicts with the overriding constraints imposed on federal government action by the Establishment Clause.

Accordingly, this Court should follow traditional canons of statutory construction by interpreting RFRA to preclude cost-shifting religious accommodations like the one sought by Hobby Lobby, so as to avoid a violation of the Establishment Clause.

A. Observing Establishment Clause Limits Is a Compelling Government Interest.

RFRA itself signals that the statutory rights it creates are subject to overriding constitutional constraints. The statute permits the federal government to place substantial burdens on a person's exercise of religion so long as "it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The standard for determining a compelling governmental interest under RFRA is the same as "the compelling interest test . . . set forth in prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5).

This compelling-interest test provides a means of conforming RFRA to the constitutional requirements

of the Establishment Clause. The government has a compelling interest in acting within the limits imposed by the Establishment Clause. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling."); *Gentala v. City of Tucson*, 213 F.3d 1055, 1066 n.9 (9th Cir. 2000) ("Obeying the mandate of the Establishment Clause is undeniably a compelling state interest."); *see also Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1564 (6th Cir. 1992) (Lively, J., dissenting) ("Every unit of government in the United States ... has a compelling interest in observing the Establishment Clause and preserving the values that Clause guarantees.").

Thus, even assuming that Hobby Lobby may bring a RFRA claim as a for-profit corporation and that the Mandate imposes a substantial burden on its exercise of religion, that burden cannot justify a RFRA exemption from the Mandate because the government has a compelling interest in remaining within the constitutional boundaries set by the Establishment Clause. The least restrictive means of avoiding an Establishment Clause violation – indeed, the only means – is to interpret RFRA not to authorize courts to grant exemptions where, as here, doing so would shift significant costs to third parties.

B. Other Exemptions from the Mandate Do Not Diminish the Compelling Governmental Interest Because They Do Not Shift the Costs of a Religious Accommodation to Third Parties.

Referring to the exemptions from the Mandate found in the ACA and its implementing regulations, the Tenth Circuit determined that "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *accord Conestoga Wood Specialties*, 724 F.3d at 413 (Jordan, J., dissenting) ("The government's arguments against accommodating the Hahns and Conestoga are 'undermined by the existence of numerous exemptions [it has already made] to the . . . mandate.'" (quoting *Newland*, 881 F. Supp. 2d at 1297)).

That the Mandate allows other permissible exemptions has no bearing, however, on whether a cost-shifting religious exemption violates the Establishment Clause. The existence of other exemptions cannot cure an unconstitutional exemption because the government's interest in complying with the Constitution is paramount and unwaivable. The ACA exemptions are facially permissible precisely because they do not violate the Establishment Clause or any other constitutional provision.

The Mandate provides two primary religious accommodations.[9] First, it fully exempts "churches,

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[9] The Mandate includes other exemptions, but these are religiously neutral and thus do not implicate the Establishment Clause. *See, e.g.*, I.R.C.

their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," so long as these are operated as nonprofit entities under the Internal Revenue Code. 45 C.F.R. § 147.131(a) (citing I.R.C. § 6033(a)(3)(A)(i), (iii)). And second, it provides an accommodation to religious organizations that oppose the coverage of mandated contraceptives on religious grounds, are organized and operated as nonprofit entities, hold themselves out as religious organizations, and self-certify to these three criteria. 29 C.F.R. § 2590.715-2713A(a).

In this second case, contraceptive coverage is provided instead by the religious nonprofit's health insurer or health plan administrator. *See* 29 C.F.R. §§ 2590.715-2713A(b)(2),(3), 2590.715-2713A(c)(2)(ii);

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§ 4980H(c)(2)(A) (employers with fewer than 50 employees are not required to provide employee health insurance; however, if they choose to do so, they must adhere to the Mandate, *see* 42 U.S.C. § 300gg-13(a)(4)); 45 C.F.R. § 147.140 (plans that do not significantly alter their coverage after March 23, 2010, are exempt from the Mandate and most other requirements of the ACA);.

The statute also creates a minor exemption for individuals who voluntarily join a "health care sharing ministry" through which members share medical expenses that conform to their collective ethical or religious beliefs. I.R.C. § 5000A(d)(2)(B). Given the voluntary nature of such a ministry, no third-party burdens are imposed.

45 C.F.R. §§ 147.131(b), 156.50(d).[10] Because payment for contraception within a health care plan is at least cost-neutral, the third-party insurer does not incur additional net costs.[11] *See* 78 Fed. Reg. at

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[10] *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-cv-2611-WJM-BNB, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *temporary injunction granted*, No. 13A691, 2013 WL 6869391 (U.S. Dec. 31, 2013), addresses a subsidiary problem that arises when a religious nonprofit's health plan administrator itself asserts religious objections to providing contraceptive coverage. The District Court concluded that when such an administrator is exempt from regulation under ERISA, the administrator need not provide contraceptive coverage, and the religious nonprofit satisfies its obligations under the ACA by self-certifying its religious objections without regard to the administrator's parallel objection. *Id.* at *11–12. This idiosyncratic issue is the subject of continuing litigation, but will affect only a very small number of employers and employees.

[11] Studies have concluded that coverage for contraception reduces net reimbursable costs by virtue of savings in prenatal care, childbirth, and medical treatment of newborns. *See, e.g.*, Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363, 366–67 & n.13, 394–95 (1998); Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 Guttmacher Pol. Rev. 7, 10 (2010); James Trussell et al., *Cost Effectiveness of Contraceptives in the United States*, 79 Contraception 5, 5 (2009) ("Contraceptive use

39,872–73, 39,877. To the extent insurers do, in fact, incur net costs for providing mandated contraceptive coverage, these costs may be allocated as an administrative expense to all insured healthcare plans (other than those plans entitled to the religious accommodation), or reimbursed by a credit against the health insurance exchange tax. 78 Fed. Reg. at 39,877–78.

Neither the church exemption nor the religious nonprofit accommodation violates the Establishment Clause. As the government has observed, it is likely that employees of churches that religiously object to contraception will share that objection and thus will not suffer a significant burden if the church's health plan does not cover contraception. As for the religious nonprofit accommodation, employees of the accommodated religious employers continue to receive all contraceptives covered by the Mandate without cost-sharing; they simply receive them from

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saves nearly $19 billion in direct medical costs each year"); C. Keanin Loomis, Note, *A Battle over Birth "Control": Legal and Legislative Employer Prescription Contraception Benefit Mandates*, 11 Wm. & Mary Bill Rts. J. 463, 477–78 (2002). These savings in reimbursable costs are likely to be equal to or greater than the cost of mandated contraceptive coverage. Accordingly, premiums charged by a third-party insurer could, in fact, be lower when no-cost contraception coverage is included. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727–28 (Feb. 15, 2012).

their employer's health insurer or plan administrator rather than the religious nonprofit employer.

Accordingly, the permissive religious accommodations afforded under the ACA pose no conflict with the Establishment Clause. It is Hobby Lobby's invocation of RFRA to avoid compliance with the Mandate that raises constitutional concerns. And those concerns cannot be overcome.

CONCLUSION

For these reasons, the Establishment Clause requires reversal of the judgment of the United States Court of Appeals for the Tenth Circuit and affirmance of the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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